



Office of the Attorney General

State of Texas

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DAN MORALES

ATTORNEY GENERAL

Jeff Hankins
Legal Assistant, Program Division
Legal Services 110-1C
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR92-368

Dear Mr. Hankins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the act), V.T.C.S. article 6252-17a. Your request was assigned ID# 14817.

On April 1, 1991, the Commissioner of Insurance issued a directive (the directive) that, pursuant to article 1.24 of the Insurance Code, instructed insurance companies writing workers' compensation insurance policies to submit information responsive to the following six queries with regard to calendar years 1989, 1990, and the first quarter of 1991:

1. The number of workers' compensation policies written by your company during each period, and the dollar amount of gross premium collected from such policies during each period, excluding any surcharges imposed.
2. The dollar amount of any surcharges, or other fees or charges paid by a policyholder which were not derived from an authorized rate or rating methodology, imposed on such policies during each period.
3. The number of workers' compensation policyholders who purchased excess liability insurance coverage from your company or its affiliates during each period, and the dollar amount of premiums attributable to such coverage during each period.

4. The number of workers' compensation policyholders who purchased foreign coverage through an endorsement to the workers' compensation policy from your company or its affiliates, with the dollar amounts of premiums or other income received from such arrangements, during each period.

5. The number of workers' compensation policyholders who entered into service contracts or other arrangements for claims consultation services, safety engineering consultation services, audit consultation services or similar services with your company or its affiliates or other persons, and the dollar amounts of fees or other income received from such arrangements for each period.

6. The number of workers' compensation policies issued by your company or its affiliates which involve retrospective premium calculations and which had upward adjustments for expenses during each period, together with the dollar amounts of such upward adjustments for each period.

You explain that the department has received a request for the information insurance companies submitted in response to the directive. Specifically, the requestor seeks the following:

1. Copies of all documents filed by any insurer in compliance with Commissioner's Directive dated April 1, 1991.
2. Copies of all briefs submitted by any insurer in support of their position in response to that directive.

The department has informed us that it already has made available to the requestor much of the requested information. The department has submitted representative samples of the information the department already has released. The department claims that sections 3(a)(4) and 3(a)(10) of the act except the remainder of the

information submitted in response to the directive.¹ The department also has submitted for our review that information.

We note that the representative samples of information the department already has released contain numerical data reflecting total numbers of workers' compensation policies or policyholders fitting a certain description and total monetary amounts received as premiums, surcharges, fees, or upward adjustments. While the information the department seeks to withhold contains numerical data similar to that released, the withheld information also includes additional and related information. For instance, the information the department seeks to withhold includes lists of policyholders and percentages used to calculate retrospective rating plans.

Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4)'s principal purpose is to protect the interests of a governmental body that relate to competition for a contract or benefit, in which the government may wish to withhold information to obtain more favorable offers. Open Records Decision No. 592 at 8. The exception is designed to protect the governmental body's interests, not the interests of the private parties that submitted the information to the governmental body. *Id.* at 9. We do not understand the information you seek to withhold to be

¹Under § 7(c) of the act, "[i]n cases in which a third party's privacy or property interests may be implicated," a person whose interests may be implicated may submit, subsequent to the governmental body's request for an open records decision to the attorney general, to the attorney general a written statement containing the person's reasons for withholding or releasing the information. In their written statements, two of the companies that would be affected by the release of the requested information claim that sections 3(a)(1) and 3(a)(12), as well as sections 3(a)(4) and 3(a)(10), except the information from required public disclosure. Section 3(a)(1) protects a person's privacy interests by excepting from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The requested information is not made confidential by statutory or constitutional law. The common law is subsumed in section 3(a)(10). Open Records Decision No. 592 (1991) at 2. Thus, for purposes of this opinion, we may combine our consideration of the common law with our consideration of the applicability of section 3(a)(10). *See id.*

Section 3(a)(12) protects "information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act." In our opinion, the release of information that a governmental body may withhold from required public disclosure pursuant to section 3(a)(12) does not implicate a financial institution's privacy or property interests. Consequently, section 7(c) does not authorize a person to raise section 3(a)(12) if the governmental body has not raised it.

relevant to the protection of a governmental interest in a competitive situation. *Id.* at 8-9. Consequently, section 3(a)(4) does not permit you to withhold the requested information from the requestor.

Section 3(a)(10) excepts from required public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The section thus protects two different categories of information: (1) trade secrets and (2) commercial or financial information that the governmental body obtained from a person and that is privileged or confidential by statute or judicial decision. *Id.* at 2.

The department appears to claim that both branches of section 3(a)(10) apply. In Open Records Decision No. 592, this office emphasized that, to fall within the "commercial or financial information" branch of section 3(a)(10), the information must be confidential *by statute or judicial decision*. *Id.* at 7. We are unaware of, nor do you advise us of, any doctrine under the Texas common law that recognizes any doctrine, other than that of trade secret, that a governmental body can assert as a basis for invoking the protection of section 3(a)(10). *See id.* at 8. Accordingly, unless the information qualifies as a trade secret under the first branch of section 3(a)(10), the department may not withhold the information.

In making trade secret determinations under section 3(a)(10), this office uses the test set out in *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). As noted above, much of the information the department seeks to withhold is similar to the information the department already has released to the requestor. In other words, much of the information reflects an insurance company's total number of workers' compensation policies or policyholders fitting a certain description or the total amounts of money the insurance company received as premiums, surcharges, fees, or upward adjustments. We do not believe that this kind of information satisfies the *Huffines* test. Accordingly, you must release this information to the requestor.

Some of the information the department seeks to withhold as a trade secret consists of percentages that an insurance company uses to calculate retrospective rating plans. We are advised that insurance companies generally keep this type of information confidential, disclosing it only to those persons within the company who need to know the information. Additionally, we are advised that this type of information is very valuable to an insurance company, and the release of such information unfairly would advantage an insurance company's competitors. Thus,

this type of information satisfies the *Huffines* test for trade secrets, and the department therefore must withhold the information from the requestor.

The remaining information that the department seeks to withhold contains policyholder lists. The Texas Court of Appeals has recognized an insurance company's policyholder lists and pricing information as a trade secret. *Murco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 604-05 & nn.4-7 (Tex. App.--Dallas 1990, no writ). Accordingly, we believe that the policyholder lists constitute trade secrets, and the department therefore also must withhold these lists.

For your convenience, we have marked the information that you must withhold from the requestor. Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-368.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Opinion Committee

KO/CAB/lmm

Enclosures: Marked documents

cc: Mr. Bob Roberts
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